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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

MASIMO CORPORATION

Plaintiff,

v.

POLITAN CAPITAL
MANAGEMENT LP, POLITAN
CAPITAL MANAGEMENT GP LLC,
POLITAN CAPITAL PARTNERS GP
LLC, POLITAN CAPITAL NY LLC,
POLITAN INTERMEDIATE LTD.,
POLITAN CAPITAL PARTNERS
MASTER FUND LP, POLITAN
CAPITAL PARTNERS LP, POLITAN
CAPITAL OFFSHORE PARTNERS
LP, QUENTIN KOFFEY, MICHELLE
BRENNAN, MATTHEW HALL,
AARON KAPITO, WILLIAM
JELLISON, DARLENE SOLOMON,

Defendant(s).

Civil Action No. 8:24-cv-01568-JVS-JDE

**PLAINTIFF'S SUPPLEMENTED
MEMORANDUM OF POINTS &
AUTHORITIES IN SUPPORT OF
MOTION FOR PRELIMINARY
INJUNCTION**

Hearing Date: September 9, 2024
Time: 1:30 PM
Courtroom: 10C
Honorable James V. Selna

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I. INTRODUCTION

Masimo stockholders face a monumental decision in less than four weeks: should Masimo’s independent board, led by the Company’s inspirational founder, Chairman, and CEO, Joe Kiani, run the Company, or should stockholders allow Politan and its predatory founder and activist investor, Quentin Koffey, to take full control of the Board with only 9% ownership of Masimo? Under the federal securities laws, the stockholders must be allowed to make this decision based on truthful information and facts, not misrepresentations. Expedited discovery has conclusively revealed that Koffey and his New York-based hedge fund, Politan, made false and misleading statements in their Proxy Materials as part of a multi-year plan to gain control of Masimo on false pretenses, while depriving Masimo’s stockholders of a valuable control premium (often 20%-40% above the trading price). If Masimo stockholders vote for Politan’s director nominees based on misrepresentations, the harm will be irreparable.

Discovery has shown that Politan and Koffey—while a Masimo director with fiduciary duties to all stockholders—directly contacted former employees of Masimo to dig up dirt on the Company; those former employees later became “confidential witnesses” in complaints filed against Masimo by several firms including Wolf Haldenstein. Moreover, Koffey and Politan solicited investors into their fund specifically to take control of Masimo, while misrepresenting that their intentions were broader than a “single investment” attack. They lied by denying they were trying to take control of the Company. They made up stories about not being onboarded properly and being denied access to information. And they misrepresented potential strategic transactions that could have unlocked value for all of Masimo’s stockholders—because what was good for the Company’s stock price was bad for their chances of winning the proxy contest.

Their lies mattered. Shareholder advisory services Institutional Shareholder Services (“ISS”) and Glass Lewis parroted Koffey’s lies in recommending that

1 stockholders vote in favor of Politan’s slate. Stockholders are at risk of believing
2 the misrepresentations. Court intervention is necessary to prevent Koffey and
3 Politan from taking control by misleading Masimo’s stockholders. The harm would
4 be irreparable once Koffey and Politan are empowered to undertake all manner of
5 corporate actions that cannot be unwound. As the Supreme Court has instructed, “in
6 corporate control contests the stage of preliminary injunctive relief, rather than post-
7 contest lawsuits, is the time when relief can best be given.” *Piper v. Christ-Craft*
8 *Indus.*, 430 U.S. 1, 42 (1977). The relief Masimo seeks is simple—an order
9 enjoining Koffey and Politan from voting any proxies they solicited until they
10 correct their false statements.

11 **II. STATEMENT OF FACTS**

12 **A. Kiani Founds Masimo In His Garage 35 Years Ago**

13 Kiani founded Masimo in 1989, growing the company from a garage start-up
14 into a successful public company that generates \$2 billion in annual revenue. Ex.
15 106. Since going public in 2007, Masimo has delivered average annual revenue
16 growth of 12%, more than double the market growth rate. Ex. 105.

17 **B. Self-Described “Veteran Activist” Koffey Launches Hedge Fund 18 And Immediately Targets Masimo**

19 Koffey started Politan three years ago in New York. Ex. 8, -16. Koffey has
20 never held a senior management position at any medical or consumer technology
21 company (or any public company), has no prior investment experience in the
22 medical device industry, and had no public company board experience before joining
23 Masimo’s Board in 2023. *See id.*; Ex. 4, -275-277. Koffey and Politan have
24 launched proxy contests against Centene Corporation and Azenta Life Sciences,
both of which have since underperformed. *Id.*

25 In February 2022, Masimo’s stock price fell after announcing its acquisition
26 of consumer-technology company Sound United, and Koffey saw an opportunity to
27 eventually take control of Masimo. Just three days later, Politan engaged
28 AlphaSights—a company that claims to provide “frictionless access” to confidential

1 “expert insights” on companies—and began gathering intelligence on Masimo’s
2 corporate governance, operations, finances, and strategies. Ex. 96; Ex. 1. Over the
3 next several months, AlphaSights identified ten former Masimo employees for
4 Koffey and others at Politan to speak with about Masimo. *See* Ex. 2, -488-494; Ex.
5 3; Ex. 5, -613-629. During these paid-for conversations, Politan sought information
6 on a number of topics, including their views of the impact on Masimo “*[i]f Kiani*
7 *left.*” Ex. 6, -590; *see also* Ex. 94, 43:21-24.

8 By June 2022, Politan’s plans for Masimo were clear: “*take board seats as*
9 *necessary.*” Ex. 4, -241. Politan solicited current and potential investors with a slide
10 deck marketing a “Single Investment” in Masimo. *Id.* Politan highlighted Koffey’s
11 “History of Engaging and Driving Consequential Changes” at eight companies,
12 including obtaining board seats at seven of them and a CEO change at five. *Id.*, -
13 276; *see also* Ex. 94, 177:2-21; 179:18-25. The presentation outlined a “Clear Path
14 to Board Seats” at Masimo and targeted each of the next two annual meetings, with
15 a focus on 2024.¹ *Id.*, -268, -272.

16 Politan finally filed a Schedule 13D on August 16, 2022, revealing it had been
17 quietly accumulating \$750 million worth of Masimo stock for months—apparently
18 through swaps and derivative instruments to avoid SEC reporting requirements—
19 and now owned 8.4% of the Company. *See* Ex. 101; Ex. 7; *see also* Ex. 94, 177:2-
20 178:11. Notwithstanding its direct marketing and fundraising efforts, Politan never
21 disclosed in its Schedule 13D that it had solicited or obtained funds from investors
22 for the specific purpose of acquiring Masimo shares.

23
24
25 ¹ In correspondence with the SEC in 2023 about the sufficiency of these
26 disclosures, Politan assured the SEC that the funds used to acquire Masimo stock
27 came from Politan’s general fund and not from a special purpose vehicle that was
28 specifically targeting the purchase of Masimo stock. Discovery in this action has
shown that Politan was, in fact, fundraising for the specific purpose of buying
Masimo stock. As Politan’s proxy filings reveal, the vast majority of its acquisition
of the Masimo derivatives occurred in the months immediately *after* the June 2022
“Single Investment” presentation. *See* Ex. 84, Schedule I, I-1, I-2; Ex. 86, Schedule
I, I-1, I-2.

1 In April 2023, Politan nominated Koffey and Brennan to fill the two open
2 Board seats. Both were elected. Ex. 8, -11; Ex. 86, -6.

3 **C. Koffey Arrives On Board With No Intent To Work Constructively**

4 **1. Koffey And Politan Recruit Former Masimo Employees,**
5 **Some Of Whom Later Appear As “Confidential Witnesses”**
6 **Against Masimo**

7 Less than two months after Koffey joined the Masimo Board, the Company
8 was named in a securities class action lawsuit. The stockholder plaintiffs in that case
9 alleged that Masimo misled investors about its financial performance in the second
10 quarter of 2023. *See Vazquez v. Masimo Corp.*, No. 23-cv-01546-L-DEB (S.D. Cal.
11 Aug. 22, 2023). Two weeks later, Masimo instructed Koffey to preserve all
12 documents relating to the lawsuit. *See* Ex. 102, -941; Ex. 94, 311:22-313:4.

13 Shortly after learning about the lawsuit, Koffey’s Politan partner Aaron
14 Kapito contacted AlphaSights again, this time with a new “angle”—Politan wanted
15 to “set up calls with former Masimo sales people – the more recent the departure the
16 better.” Ex. 26, -142.

17 But AlphaSights’ policy prohibited former employees from disclosing
18 material nonpublic information about their employers, and thus did not allow those
19 employees to speak about their employment until six months after they left. Politan
20 assured AlphaSights that the six-month rule “should not apply” because, “[w]e are
21 on the board of the company.” *Id.* That representation did not persuade AlphaSights,
22 which explained that the rule “protect[ed] clients and is in line with best practices
23 for our industry.” *Id.* Undeterred, Politan insisted that AlphaSights find Masimo
24 salespeople “who left less than 6 months ago.” *Id.* When AlphaSights connected
25 with a salesperson who left in July 2022 (more than six months earlier), Politan
26 responded: “we are really focused on what happened in 4Q22, 1Q23 and 2Q23.”
27 *Id.*

28 That same day, Politan again asked AlphaSights to “keep sourcing 2023
formers.” Ex. 27, -585. AlphaSights refused to violate its “six-month rule,” but it

1 did recruit other former employees who left Masimo in 2022, including [REDACTED]
2 [REDACTED], a Patient Monitoring Specialist from December 2020 through June 2022 who
3 reported “to the Head of Sales for the US.” *Id.*, -583.

4 Unsatisfied with AlphaSights’ results, Politan contacted Mosaic Research
5 Management—another “expert network” service. Ex. 29. Kapito asked Mosaic to
6 “initiate a search for former Masimo employees [] who specifically were employed
7 at the company in 2023.” *Id.* Kapito assured Mosaic, “We are on the board of the
8 company, so we have no rules pertaining to when employees left the company.” *Id.*
9 Mosaic located “three former employees who departed in early 2023.” *Id.* Two days
10 later, Mosaic sent information about one such employee, [REDACTED], who had
11 served as Territory Manager for Alternate Care, Great Lakes West, from June 2011
12 through April 2023. [REDACTED] said he had reported to an Area Manager (three levels
13 from the CEO). *See* Ex. 31, -764. Mosaic asked if Politan wanted to speak with
14 [REDACTED] and Kapito immediately responded, “Yes!” *Id.* When they connected a
15 few days later, [REDACTED] specifically told Kapito that [REDACTED] was “[n]ot aware of any
16 discounting or channel stuffing” at Masimo. Ex. 32, -680.

17 Koffey—a *sitting director*—did not inform either the Board or anyone at
18 Masimo that he and Politan were finding, recruiting, and paying former Masimo
19 employees to secretly speak with Politan.

20 Less than four months after Politan privately communicated with these former
21 employees, the stockholder plaintiffs in the securities class action filed an amended
22 complaint. That complaint expanded the class period to cover (among other periods)
23 4Q22, 1Q23, and 2Q23—the same periods Politan told AlphaSights it was “really
24 focused on.” Ex. 27, -598. The complaint also added allegations citing unnamed
25 former Masimo employees. Two of those former employees (CW-4 and CW-6) fit
26 the exact descriptions of [REDACTED], whom Politan had found and recruited
27 to speak to Politan about the Company. *See, e.g., Vazquez*, Dkt. 28, ¶¶ 44, 46
28 (describing CW-4 as a “Remote Patient Monitoring Specialist” from December 2020

1 to June 2022, and CW-6 as “Territory Manager for Alternate Care, Great Lakes
2 West” from June 2011 to April 2023). In a follow-on derivative lawsuit, the
3 plaintiffs, represented by Wolf Haldenstein Adler Freeman & Herz LLP, cited these
4 same former employees in their complaint. *See Himmelberger v. Kiani*, No. 24-cv-
5 00868 (S.D. Cal. May 16, 2024), Dkt. 1, ¶¶ 32, 34 (describing FE 4 as a “Remote
6 Patient Monitoring Specialist” from December 2020 to June 2022 and FE 6 as
7 “Territory Manager for Alternate Care, Great Lakes West” from June 2011 to April
8 2023).

9 **2. Masimo Extensively Onboards Koffey And Brennan**

10 Koffey and Brennan’s statements in their proxy materials (the “Politan Proxy
11 Materials”)² that they were somehow not properly onboarded is belied by the facts.
12 First, neither director has any meaningful point of comparison: Koffey has *no* prior
13 public company board experience, and Brennan has served on only two public
14 company boards, one of which she served on behalf of activist shareholders. Ex. 93,
15 10:16-12:2; Ex. 94, 97:4-5. According to Bob Chapek,³ a Masimo director with
16 substantial board and management experience, Masimo’s onboarding process for
17 directors is robust. Chapek Decl. ¶ 6.

18 Shortly after joining Masimo’s Board, Koffey sent Masimo’s General
19 Counsel, Tom McClenahan, an “initial” list of items that Koffey wanted to review
20 for his onboarding. McClenahan promptly shared those voluminous materials,
21 including board books and minutes from prior meetings, engagement letters with
22 advisors, organizational charts, forecasts by product platform, and quarterly
23

24 ² The Politan Proxy Materials consist of: (1) The Preliminary Proxy Statement filed
25 on June 3, 2024; (2) the Definitive Proxy Statement filed on June 21, 2024; (3) the
26 Investor Letter regarding Politan’s proxy campaign released on June 26, 2024; (4)
27 the Investor Presentation released on June 26, 2024; (5) the “Correcting the Record”
Investor Presentation released on July 1, 2024; (6) the letter released by Michelle
Brennan urging a “cultural reset” in the Company’s boardroom on July 11, 2024;
and (7) the August 6, 2024 amendment to the Definitive Proxy Statement.

28 ³ Chapek is the former Chief Executive Officer of The Walt Disney Company
(including serving on its board of directors), and spent nearly 30 years at Disney.

1 financial updates. Exs. 12, 13; McClenahan Decl. ¶¶ 3-6; *see also* Ex. 19. Masimo
2 made its outside advisors available to Koffey and Brennan, and they met with
3 Masimo's financial advisor, Morgan Stanley. Ex. 18; Collins Decl. ¶ 2.

4 In the months that followed, while Politan pumped AlphaSights for meetings
5 with former employees (*supra* Section II.B), Koffey and Brennan continued to
6 receive detailed information about the Company from management. Ex. 24, -102
7 ■■■, -106-11; *see also* Young Decl. ¶ 7.

8 In October 2023, Young presented the Board with a detailed management plan
9 for 2024 and long-range plans through 2033, and then shared the materials with
10 Koffey. Exs. 33, -130; ■■■, -1132.

11 Koffey further received extensive onboarding materials related to his role on
12 Masimo's Audit Committee. Ex. 36. Masimo's VP of Internal Audit, Michael
13 Palumbo, offered Koffey a "deeper dive on [his] [Audit Committee] slides." Ex. 37.
14 Koffey and Palumbo spoke for over an hour and addressed Koffey's questions.
15 Palumbo Decl. ¶ 4, 6-7. Palumbo also offered to meet with Brennan, a meeting
16 *Brennan* eventually cancelled. Ex. 47.

17 Koffey and Brennan had ample opportunity to meet with and receive
18 information from the COO for Healthcare, Bilal Muhsin, and COO for Consumer,
19 Blair Tripodi, who presented detailed operating plans and major initiatives for their
20 businesses. *See supra* Section II.C; Ex. 41.⁴ The Politan Proxy Materials
21 nevertheless state that Koffey and Brennan were never given access to the head of
22 U.S. sales. Ex. 86, -7. As Chapek testified, however, the Board had ample access
23 to management and, in fact, the bosses to whom the head of U.S. sales reports met
24 with the Board. Ex. 95, 172:13-174:13.

25 Koffey's requests were unusual. According to Chapek, "I had never seen in
26 my three years of being on the Disney board a board member asking for that much

27 ⁴ On February 13, 2024, the financial guidance for 2024 was approved by the
28 Board, and the short- and long- term financial targets for executive compensation
were approved by the compensation committee.

information, that specific of information, and that detailed level of information.” Ex. 95, 66:21-67:2; *see also* McClenahan Decl. ¶ 8; Palumbo Decl. ¶ 9.

3. The Company Presents FY 2024 Budget To The Board

The Politan Proxy Materials state that the Board did not see a draft or final budget for FY 2024. Ex. 86, -7. The opposite is true. In October 2023, management presented the preliminary budget for 2024 and the next five years. Ex. 92, 286:6-18. At the February 13, 2024 Board meeting, Masimo’s management presented the Company’s operating plan, *i.e.*, the budget. Ex. 95, 97:5-10. Chapek testified that anyone who had a “reasonable understanding of, you know—a very cursory understanding of business” would recognize that the materials presented to the Board were the Company’s budget and operating plan. *Id.*, 100:12-19. Chapek added: “This is the first time in my nearly 40-year career that there has been some perceived level of ambiguity as to what a budget is or what a plan is.” *Id.*, 102:12-15, 104:22-25. Chapek applauded management for the information presented and the quality of the reports. *Id.*, 67:4-21.

4. Koffey And Brennan Refuse To Sign 10-K

Koffey and Brennan received all the information they could reasonably need to sign Masimo’s 10-K. But they refused, because signing was inconsistent with their efforts to win their proxy fight. *See* Mikkelson Decl. ¶¶ 3-4.

By late February all of the independent directors were prepared to sign the 10-K, except Koffey and Brennan. In an attempt to address whatever ambiguous, purported concerns Koffey had, Masimo management met with Koffey for hours on Saturday, February 24, 2024, and spent Sunday and Monday preparing for additional presentations on Tuesday. Palumbo Decl. ¶ 8; McClenahan Decl. ¶ 10. At these meetings, the operating heads of major businesses each made lengthy presentations. Ex. 95, 33:7-10. The Board, including Koffey, was provided ample opportunity to ask questions. *Id.*, 33:4-6, 11-14. Koffey and Brennan did not have additional questions after those presentations, but still refused to sign. The remaining directors

1 ultimately approved and signed the 10-K. Koffey admitted that while all of his
2 questions had been answered, “his lawyers had told him it would not look good if he
3 had criticized the lack of information he had received and then signed the Form 10-
4 K.” Chapek Decl. ¶ 11.

5 **5. Koffey Manipulates Plans For A Potential Spin-Off**

6 Koffey engaged in a pattern of manipulation regarding a potential spin off of
7 Masimo’s Consumer Business and the related special committee (“Committee”)
8 process. He lied about who proposed key terms (to create the appearance that Kiani
9 was prioritizing his interests over stockholders); he lied about the extent of his
10 negotiations with Kiani before the Committee was established (to shift the
11 Committee’s role from evaluating only targeted aspects of the proposed transaction
12 to renegotiating entirely); and he lied about the Committee process itself.

13 On January 29, 2024, Kiani and Koffey met to discuss a proposed spin-off of
14 Masimo’s Consumer Business. Ex. 92, 122:10-24. Both expressed general support
15 for the idea. *Id.*, 123:17-19. During that meeting, Koffey suggested that Kiani obtain
16 control of the proposed spun-off entity (“SpinCo”) through the issuance of high-vote
17 stock and depart from the existing Masimo entity (“RemainCo”), triggering Kiani’s
18 change-in-control payment under his employment agreement. *Id.*, 122:25-123:5,
19 124:6-8. This structure would enable Koffey to oust Kiani from Masimo, while
20 allowing Kiani an exit strategy. *Id.*, 123:11-16.

21 Shortly after, Koffey hand-delivered a term sheet to Kiani memorializing their
22 agreed-upon terms, including Kiani’s change-in-control payment being “triggered”
23 by the transaction and Kiani’s “control” of SpinCo through “either high vote stock
24 or 50+%.” Ex. 54, -486; Ex. 92, 124:11-13, 128:21-22, 133:17-21. Koffey also
25 agreed to support, at the Board level, three handwritten additions (proposed by
26 Kiani) concerning *employees’* change-in-control provisions, and the transfer of cash
27 and Masimo’s headquarters to SpinCo. Ex. 54, -486; Ex. 92, 124:14-16, 130:10-
28 131:5.

1 On February 1 and 3, 2024, counsel for Politan and Masimo exchanged term
2 sheets, confirming these fundamental terms but providing additional detail
3 concerning the structure of the contemplated transaction. Exs. 38, -55; Ex. 92,
4 134:1-6, 135:5-9. Following these exchanges, Koffey and Kiani agreed to present
5 their agreement to the Board. Ex. 88; Ex. 92, 146:4-147:7. They also discussed
6 forming a special committee to negotiate only those portions of the deal implicating
7 Kiani's financial interest—namely his ownership in SpinCo. Ex. 55; Ex. 92, 131:15-
8 132:18, 136:14-19.

9 At a dinner with several other directors on February 12, 2024, Koffey
10 represented that he and Kiani had reached agreement on the spin-off terms. *See*
11 Reynolds Decl. ¶¶ 5-6. Koffey outlined the terms, which mirrored those Kiani had
12 described to board member Craig Reynolds after the January 29 meeting, including
13 Kiani's entitlement to a change-in-control payment and control of SpinCo. *Id.*

14 The next day, on February 13, these discussions were confirmed when the
15 Board discussed the transaction and formation of the Committee. Ex. 42. At the
16 Board meeting, Koffey “provided an overview of the agreement he and Kiani
17 reached,” including that Kiani would leave Masimo, obtain “majority voting control
18 of SpinCo through high vote stock,” and would be entitled to his change-in-control
19 payment. *Id.*; Ex. 92, 147:3-15; Reynolds Decl. ¶ 6; Chapek Decl. ¶ 7; McClenahan
20 Decl. ¶ 11. The Board then approved the Committee, composed of Koffey, Brennan,
21 Reynolds, and Rolf Classon. Ex. 42.⁵

22 When the Committee was formed, Koffey had already begun working behind
23 the scenes to advance his own interest for Politan's forthcoming proxy contest,
24 contrary to the goals he had represented to the Board. *See* Ex. 93, 34:2-12. At
25 Koffey's insistence, the Committee retained Sullivan & Cromwell (“S&C”) despite

26 ⁵ Notably, on April 25, after derailing the Committee process, Koffey requested a
27 “correction” to the February 13 board minutes denying that he had reached an
28 agreement with Kiani. *See* Ex. 72; Chapek Decl. ¶ 8; McClenahan Decl. ¶¶ 11-12.
This “correction” was later added to the meeting minutes as a footnote. Ex. 42;
McClenahan Decl. ¶ 12.)

1 the fact that Koffey had a separate personal attorney-client relationship with S&C
2 that he used to seek advice on matters relevant to Politan's proxy contest. Ex. 92,
3 187:12-20; Reynolds Decl. ¶ 7. Koffey then carefully controlled the flow of
4 information and used the Committee's advisors to advance his own views—

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]⁶ Importantly, the term sheets exchanged between Koffey and Kiani in
8 early February *were never distributed to the rest of the Committee*. Ex. 92, 173:8-
9 17; Ex. 93, 53:1-4, 57:4-9; Reynolds Decl. ¶ 11.

10 With the Committee in place, Koffey abandoned his prior agreement on key
11 terms and sought to discredit Kiani. [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 Koffey's significant pivot was noticeable and immediately caused concern.
20 Reynolds and Classon believed the Revised Term Sheet was inconsistent with the
21 February 13 Board meeting, and doubted SpinCo's viability. Ex. 88; Ex. 92, 167:24-
22 168:4, 168:19-23; Reynolds Decl. ¶ 9. In response, Koffey claimed that the Revised

23 _____
24 ⁶ S&C seemed to take direction directly from Koffey, rather than the Committee as
25 a whole, leading to frustration among other Committee members regarding their
26 roles. Throughout its representation, Koffey was the Committee's primary liaison
27 with S&C. [REDACTED]
28 [REDACTED]

1 Term Sheet was consistent with his conversations with Kiani. Reynolds Decl. ¶ 10.
2 Having not received copies of the earlier term sheets, Reynolds and Classon
3 reluctantly agreed to send the new term sheet to Kiani on the condition that Koffey
4 call Kiani to preview it. Ex. 92, 168:5-168:9, 170:12-14, 171:1-6; Ex. 88; Reynolds
5 Decl. ¶¶ 10-11. [REDACTED]

6 [REDACTED]
7 [REDACTED]
8 After receiving the Revised Term Sheet, Kiani called Koffey to express his
9 frustration that it represented an entirely different transaction and made SpinCo
10 unviable. Ex. 92, 181:25-182:15. Koffey falsely claimed that the term sheet
11 reflected the entire Committee's views. *Id.*, 169:15-20, 181:17-24. Kiani then
12 contacted Reynolds and Classon, who confirmed they had never seen the original
13 February term sheets and shared his concerns. *Id.*, 169:6-10, 169:21-23, 173:8-17;
14 Reynolds Decl. ¶¶ 11-12; [REDACTED]
15 [REDACTED]. After Kiani provided them with the original term sheets, Ex. 92, 174:6-
16 8; Reynolds Decl. ¶ 11, he attempted to salvage the agreement, including by making
17 significant concessions regarding control, but Koffey refused to engage. Ex. 92,
18 184:10-185:1; Ex. 95, 233:10-234:14; Ex. 88.

19 Notwithstanding these facts, the Politan Proxy Materials portray the
20 Committee, and by extension Koffey, as having “protected” Masimo stockholders
21 against Kiani's self-interested SpinCo transaction demands—when in fact it was
22 Koffey who proposed the terms. *See* Ex. 84, 10-11; Ex. 86, 9-10.

23 6. Masimo Considers Other Avenues To Increase Stockholder 24 Value

25 After his bait-and-switch collapsed the Special Committee, Koffey continued
26 to develop the false narrative that Kiani was obstructing corporate governance and
27 refusing to provide information to Board members—this time with respect to a
28 Potential Joint Venture (the “Potential JV”) with third-party investor [REDACTED]. In March

2024, █████ indicated to Masimo management that █████ would be interested in confidentially exploring a potential partnership. Exs. 48, 56.

The Board met on March 22, 2024, where “the Board authorized management to evaluate the separation of the Company’s consumer business”—separate from the proposed spin-off that was under the purview of the Committee. Ex. 58. The Board also authorized the Company to “issue a press release after the Meeting to announce the evaluation,” *id.*, which the Company issued later that same day. *See* Ex. 59. Masimo’s stock price spiked 14% in after-hours trading on the news. Ex. 68.

7. Koffey And Politan Rush To Block Separation Of Consumer Business Ahead Of Stockholder Meeting

But a stock price spike and successful separation would undermine Koffey’s efforts to take control, so he sprang into action. First, Koffey sought to quell any excitement about the potential value-maximizing transaction, texting Classon within a few hours of the March 22 Board meeting, “I need to make a series of decisions promptly now. I appreciate your being available.” Ex. 64. Koffey then quickly reached out to Politan’s nominees in the upcoming proxy contest, Bill Jellison and Darlene Solomon (the “Politan slate”), telling them that Politan would announce their nomination to the Board through a proxy contest the next business day, and that they would need to work over the weekend to finalize the announcement. Exs. 60, 61.

Before trading hours on Monday, March 25, 2024, Politan announced its nominations, resulting in an immediate 9% stock drop. Ex. 67; Ex. 68.

Koffey continued to stall the Potential JV and lie about its terms. On April 30, 2024, Kiani provided the Board with additional detail regarding the Potential JV with █████ █████. Unconcerned with enhancing stockholder value, Koffey demanded that the Board “vote to resolve that the Company will not enter into any binding agreements relating to the separation and/or JV of the Consumer Business before the conclusion of the 2024 annual meeting of shareholders.” Ex. 72.

1 Because [REDACTED] expressed concerns about Koffey and Brennan specifically, on
2 May 7, 2024, all nonexecutive Board members were asked to sign a non-disclosure
3 agreement (“NDA”) to protect [REDACTED]. Ex. 77; Muhsin Decl. ¶ 4; Ex. 92,
4 211:11-16. [REDACTED] “was concerned” that the Politan Directors would “disclose [its]
5 name publicly in order to stifle the potential transaction in advance of Masimo’s
6 stockholder meeting.” Muhsin Decl. ¶ 4. Koffey and Brennan refused to sign. Ex.
7 77.

8 Despite Koffey and Brennan’s refusal, on May 8 Kiani asked the Board to
9 meet the following week to discuss the Potential JV. Ex. 79. Rather than wait for
10 the Board meeting, that afternoon Koffey served Masimo with a Section 220
11 Demand (the “Demand”), purporting to seek the very same information regarding
12 the Potential JV that he was set to receive just a week later. Ex. 78. He then
13 publicized his Demand. Ex. 75.

14 As planned, on May 13, 2024, all members of the Board were informed of
15 [REDACTED] and provided with 75 pages of materials about the Potential JV,
16 including a non-binding term sheet, a proposed exclusivity agreement, and
17 preliminary structural and financial analyses. Ex. 80, -344-345. Koffey and
18 Brennan urged the Board to delay any further assessment until after the annual
19 meeting, presumably to prevent Masimo from negotiating a favorable deal that might
20 harm the Politan slates’ election chances. *Id.*

21 On July 15, 2024, the Board met and discussed extension of Masimo’s
22 exclusivity agreement with [REDACTED] which had since expired. Ex. 90. In an effort to
23 quell the supposed concerns raised by Koffey while preserving the opportunity to
24 enhance stockholder value, Kiani confirmed that “he would not vote in favor of any
25 joint venture or similar transaction with respect to a separation of the Company’s
26 consumer business unless the transaction is approved by Mr. Koffey.” *Id.* Koffey
27 and Brennan still refused to vote for the extension.
28

1 **D. Masimo’s Stockholders Will Decide The Future Of The Company**
2 **on September 19, 2024**

3 Masimo’s 2024 Annual Meeting of Stockholders, where the future of the
4 Company will be decided, is set for September 19, 2024. If the Politan slate wins,
5 Politan and Koffey will control four Board seats and therefore the majority of the
6 Board.

7 **III. ARGUMENT**

8 A preliminary injunction is proper when, as here, (1) Masimo is likely to
9 succeed on the merits; (2) Masimo is likely to suffer irreparable harm without
10 preliminary relief; (3) the balance of equities tips in Masimo’s favor; and
11 (4) an injunction is in the public interest. *See Winter v. Nat. Res. Def. Council*, 555
12 U.S. 7, 20 (2008). Masimo meets these four required elements for its Section 14(a)
13 and SEC Rule 14a-9 claims. Injunctive relief is necessary to prevent Koffey and
14 Politan from executing their takeover through stockholder votes obtained through
15 false and misleading proxy materials.

16 **A. Masimo Is Likely To Succeed On The Merits**

17 Section 14(a) was intended “to promote the free exercise of the voting rights
18 of stockholders by ensuring that proxies would be solicited with explanation to the
19 stockholder of the real nature of the questions for which authority to cast his vote is
20 sought.” *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 381 (1970) (quotation omitted).
21 A proxy statement violates Section 14(a) if (1) it contains “a material
22 misrepresentation or omission which (2) cause[s] the plaintiff injury and (3) [] the
23 proxy solicitation itself, rather than the particular defect in the solicitation materials,
24 was an essential link in the accomplishment of the transaction.” *N.Y.C. Emps.’ Ret.*
25 *Sys. v. Jobs*, 593 F.3d 1018, 1022 (9th Cir. 2010) (quotation omitted), *overruled on*
26 *other grounds by Lacey v. Maricopa County*, 693 F.3d 896 (9th Cir. 2012). Each
27 element is satisfied here.
28

1 **1. The Politan Proxy Materials Are False And Misleading**

2 Masimo is likely to prove that the Politan Proxy Materials contain false and
3 misleading statements and omissions and that there is a substantial likelihood that a
4 reasonable stockholder would consider them “important in deciding whether to vote”
5 for the Politan slate. *Allergan, Inc. v. Valeant Pharms. Int’l, Inc.*, 2014 WL 5604539,
6 at *15 (C.D. Cal. Nov. 4, 2014). A reasonable stockholder would find it important
7 that the Politan directors were, for example, purposefully sabotaging strategic deals
8 that could increase stockholder value, and recruiting “confidential witnesses” who
9 then appear in complaints *against* the Company and the Board. *See Mind Med.*
10 *(MindMed) Inc. v. Freeman*, 2024 WL 729260, at *2, *4 (S.D.N.Y. Feb. 22, 2024)
11 (complaint pled material misstatements where proxy “materials assert that the
12 defendants ‘attempted to engage constructively with the Board’” but omitted that
13 defendants in fact declined to participate in director selection process).

14 The Politan Proxy Materials contain a number of misrepresentations and
15 omissions that warrant correction to ensure a fully informed stockholder vote:

16 **(i) The Politan Proxy Materials Fail to Disclose That Politan Secretly**
17 **Identified and Recruited Confidential Witnesses to Undermine Masimo.** In four
18 weeks of expedited discovery, Masimo has been unable to prove that Koffey worked
19 directly with law firms representing plaintiffs in pending stockholder actions against
20 the Company. The deponents denied any such contact, and the investigators [REDACTED]

21 [REDACTED]
22 [REDACTED]
23 [REDACTED] See Ex. 107, 44-45.⁷

24 ⁷ Masimo hired [REDACTED] to conduct an investigation in connection with
25 Koffey’s proxy contest. [REDACTED]

26 [REDACTED]
27 [REDACTED] Ex. 110. [REDACTED]
28 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED] Ex. 108 -28. [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED] Ex. 107, -92. [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]

12 Given the fast pace of a proxy contest and stockholder vote, Masimo was
13 compelled to seek immediate relief to remedy the misstatements in Politan’s proxy
14 filings. [REDACTED]

15 [REDACTED]
16 [REDACTED]
17 [REDACTED] Ex. 107, 60-61. [REDACTED] were not able to verify the
18 information through on-the-record sources in the compressed timeframe, even while
19 [REDACTED] confirmed she had no reason to believe the information was inaccurate. *Id.* 95-
20 96.

21 But discovery *has* revealed direct links between Politan’s public statements in
22 support of its proxy contest and the litigation filed by lawyers including Wolf
23 Haldenstein. In Politan’s PowerPoint presentation filed with the SEC, Politan urged
24 stockholders to vote for its director candidates because of pending “whistleblower”
25 lawsuits against Masimo. Ex. 113 at 68. According to Politan, reasons to vote in its

26 [REDACTED]
27 [REDACTED] *See* Exs. 110, 114.
28 [REDACTED] *Id.* [REDACTED] *Id.*; Ex. 107, -74.

1 favor include the securities class action. Politan features a screenshot of the
2 securities class action complaint in its presentation, and quotes a former employee
3 cited in that complaint (and in the companion derivative complaint) in order to
4 question Masimo's financial reporting in the second quarter of 2023. Politan uses
5 that former employee to falsely suggest the Company was improperly discounting
6 its products and channel stuffing.

7 Koffey and Politan have concealed that they had recruited and paid former
8 employees to privately discuss the Company's performance in that same quarter—
9 including former employees who are cited as confidential sources in the class action
10 and derivative complaints against Masimo. *See supra* Section II.C.1. Koffey and
11 Politan omit that they had talked to another cited confidential source who told them
12 he was not aware of “*any* discounting or channel stuffing.” Ex. 32. Neither Koffey
13 nor Politan ever told Masimo or investors that while Koffey served on the Board, he
14 was secretly digging up dirt to help his proxy contest (and, in turn, lawsuits against
15 the Board). Parading the allegations in the pending lawsuits as a reason to vote for
16 his director candidates is false and misleading without also disclosing the work
17 Politan had done in support of those allegations (and the evidence they uncovered
18 that undermined the allegations). Stockholders should know that one of their
19 directors has been secretly recruiting witnesses to harm the Company.

20 **(ii) The Politan Proxy Materials Fail To Disclose Investor Information**
21 **Required By Rule 13D.** Item 3 of Section 13(d) of the Exchange Act provides that
22 “if any part of the purchase price is or will be represented by funds or other
23 consideration borrowed or otherwise obtained for the purpose of acquiring, holding,
24 trading or voting the securities, a description of the transaction and the names of the
25 parties thereto” must be disclosed. Ex. 103; *see also* 17 C.F.R. § 240.13d-101.
26 Politan's 13D filings do not satisfy any of Section 13(d)'s requirements. These
27 material misrepresentations and omissions in its Schedule 13D Filings—which it has
28 left uncorrected—can serve as the basis for a Section 14(a) claim. *See Mason-Dixon*

1 *Bancshares, Inc. v. Anthony Invs., Inc.*, 1997 U.S. Dist. LEXIS 23638, at *14-18 (D.
2 Md. Feb. 28, 1997) (finding likelihood of success on merits of Section 14(a) claim
3 based on material omissions in Schedule 13D filings).

4 *First*, Section 13(d) requires investors to inform the market if they intend to
5 take control of a company, as Politan planned to do here. 17 C.F.R. § 240.13d-101,
6 Item 4; *see also supra* Section II.B. But instead of doing so, Politan declined to
7 reveal its strategy. *See* Ex. 7. Indeed, when the SEC inquired with Politan in 2023
8 about its investment in Masimo, Politan assured the SEC that the money for the
9 Masimo investment was coming from its general fund with purely passive investors,
10 and was not being used to target control of the Company. In reality, and
11 unbeknownst to the SEC, in June 2022, Politan was showing potential investors its
12 “Single Investment” presentation targeting Masimo, and outlining a “Clear Path to
13 Board Seats.” Ex. 4, -1268, -1272. In the wake of that presentation, Politan went
14 on to acquire the vast majority of its derivatives and other interests in Masimo, which
15 served as the launch pad for its subsequent proxy contests and efforts to take control.
16 Yet, in both its correspondence with the SEC and its Schedule 13D, Politan omitted
17 its plans to take over the Company. *Id.*

18 *Second*, Politan’s Schedule 13D Filings do not comply with Item 3 of
19 Regulation 13D, which requires disclosure of “the source and the amount of funds,”
20 including “a description of the transaction and the names of the parties thereto.” 17
21 C.F.R. § 240.13d-101, Item 3. Politan identified the source as “derived from the
22 capital of the Politan Funds.” Ex. 7. But Politan raised funds for the direct purpose
23 of investing in and taking control of Masimo. *See* Ex. 4. To comply with Item 3,
24 Politan was required to name those investors. It failed to do so.

25 *Third*, Politan failed to comply with Item 6, which requires disclosing the
26 existence of contracts or other relationships related to its investment in Masimo and
27 “the persons with whom such contracts, arrangements, understandings or
28 relationships have been entered into.” 17 C.F.R. § 240.13d-101, Item 6. Politan’s

1 Schedule 13D disclosures claim that, besides the stock swaps, Politan had “no
2 contracts, arrangements, understandings or relationships (legal or otherwise) with
3 respect to any securities of” Masimo. Ex. 7. But that representation cannot be
4 squared with its solicitation of funds from current and potential investors for the
5 express purpose of investing in Masimo.

6 **(iii) The Politan Proxy Materials Misrepresent the Potential Spin-Off and**
7 **Koffey’s Manipulation of the Special Committee.** The Politan Proxy Materials
8 falsely claim that Kiani proposed the transaction on terms favorable to himself, the
9 Committee proposed different terms, and Kiani then killed the deal and disbanded
10 the Committee when he didn’t get his way. *See* Ex. 84 at 10-11; Ex. 86 at 9-10.
11 These misrepresentations falsely portray Kiani as self-serving, suggesting that he
12 was primarily interested in securing his own control and compensation, when in
13 reality, *Koffey* was the one pushing for these terms so Politan could gain control over
14 RemainCo. Ex. 92, 122:15-123:16; 124:6-8; 127:2-13. The Board did not form the
15 Committee because Kiani proposed a series of self-serving terms; rather, the
16 potential conflict existed only because *Koffey* proposed these terms, agreed to them,
17 and then sold the Board on them.⁸ Defendants’ misrepresentation distorts the true
18 nature of the discussions and agreements, misleading stockholders about the origins
19 and intentions behind the spin-off proposal.

20 Politan’s Proxy Materials also misleadingly omit that Koffey controlled the
21 Committee process—and relatedly falsely state that the Revised Term Sheet
22 reflected the Committee’s “unanimous[] agree[ment]” and “independent position.”
23 Ex. 84, -11. In reality, the views expressed purportedly by the Committee and its
24 advisors were, in fact, Koffey’s views. [REDACTED]

25 [REDACTED] Ex.
26 [REDACTED]

27 ⁸ [REDACTED]
28 [REDACTED]

1 92, [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 Koffey recognized that if a spin-off were accomplished prior to the 2024 annual
6 meeting, his main purported justification for his proxy campaign—to ensure that a
7 transaction involving the Consumer Business was overseen by a Board composed of
8 a majority of Politan directors—would become irrelevant. Ex. 86, -15.

9 The evidence shows that Koffey procured Classon's and Reynolds's reluctant
10 agreement to send the Revised Term Sheet to Kiani only after falsely assuring them
11 that Kiani was on board with the new terms, and by withholding the actual term
12 sheets the parties had exchanged in February. Ex. 92, 168:5-168:9, 170:12-14,
13 171:1-6; Ex. 88; Reynolds Decl. ¶¶ 9-11. Classon and Reynolds only agreed to send
14 the Revised Term Sheet to Kiani on the condition that Koffey first discuss the terms
15 with Kiani, which Koffey never did. Ex. 92, 167:24-168:9, 167:22-24, 179:18,
16 168:19-169:23; Ex. 93, -56-57. Koffey's actions undermined the spin-off process,
17 sabotaging a potentially value-maximizing deal for Masimo's stockholders, for the
18 purpose of aiding his forthcoming proxy contest. By manipulating the Special
19 Committee and presenting a term sheet that did not reflect the agreed-upon terms,
20 Koffey created confusion and mistrust among the board. Ex. 92, 189:25-16; Ex. 88.
21 The failed spin-off process had significant consequences, as it prevented the
22 Company from pursuing a strategic transaction that could have unlocked substantial
23 value for stockholders. Ex. 92, 160:9-16, 167:24-168:9, 173:11-174:3, 184:10-
24 185:1; Ex. 93, -57-58.

25
26 **(iv) The Politan Proxy Materials Fail To Disclose and Misrepresent**
27 **Politan and Koffey's Work To Delay and Defeat Other Stockholder Value-**
28 **Maximizing Transactions.** The Politan Proxy Materials falsely claim Masimo

1 “refused to disclose” the Potential JV Partner’s identity to the Board until Koffey
2 made his Demand on May 8, 2024. Ex. 84, -11-13; Ex. 86 -10-12. Not so. On May
3 7, 2024, all nonexecutive Board members were asked to sign the same NDA to
4 protect [REDACTED] at [REDACTED] request given its concern that the Politan Directors
5 would “disclose [its] name publicly in order to stifle the potential transaction[.]”
6 Muhsin Decl. ¶ 4. Ex. 79; Ex. 92, 211: 11-16. At no point did Kiani refuse to
7 provide these details, even after Koffey and Brennan refused to sign the NDA:
8 instead, that same day Kiani asked the Board to meet the next week to further discuss
9 the Potential JV. Ex. 79. Koffey *thereafter* sent the Demand, demanding
10 information on the Potential JV, Ex. 78, information he was already set to and did
11 receive just a week later. Ex. 80].

12 The Politan Proxy Materials falsely claim that Kiani signed a term sheet with
13 [REDACTED] “without providing any information to the Board.” Ex. 89, Slide 15. However,
14 on April 30, [REDACTED]
15 [REDACTED]
16 [REDACTED] Ex. 73. It was not until May 7
17 that Masimo entered into a *non-binding* term sheet with [REDACTED] Likewise, Politan’s
18 statement that “on May 16, 2024, the Board was for the first time provided with the
19 name of the joint venture partner” is also false. Ex. 86. The Board was provided
20 ample information about the JV, [REDACTED], on May 13, three days
21 before the May 16 Board meeting.

22 The Politan Proxy Materials further falsely claim that “Kiani intends to be
23 Chairman of the new entity.” Ex. 87, -6. Again, this is false. [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28

1 **(v) The Politan Proxy Materials Falsely State That The Politan Directors**
2 **Were Not Properly Onboarded.** The Politan Proxy Materials falsely allege that
3 the Politan Directors were never “onboard[ed],” did not receive “basic information,”
4 were “denied...access to management,” and were excluded from Board meetings.
5 Ex. 84, -6-7, 17; *see also* Ex. 87, -2; Ex. 89, -24. These statements are contradicted
6 by the extensive onboarding briefings and information provided to the Politan
7 Directors, which included thousands of pages of Masimo’s historical Board
8 materials and numerous meetings with and routine access to Masimo’s management
9 team, independent auditor, and outside advisors. *Supra* Section II.C.2. Furthermore,
10 the Politan Directors were invited to, and did attend, all Board and committee
11 meetings since joining the Board. *Id.* Section II.C. Neither their lack of experience
12 nor desire to win the proxy contest justifies Koffey and Brennan’s
13 misrepresentations about their onboarding experience.

14 **(vi) The Politan Proxy Materials Falsely State That the Politan Directors**
15 **Were Not Provided With a Budget.** The Politan Proxy Materials falsely claim that
16 the Politan Directors never received budget information. This assertion, which
17 Koffey repeated to ISS and ISS printed, is demonstrably false, as the indisputable
18 evidentiary record makes clear. Ex. 112, -22 (“[T]he dissident reports that the board
19 does not see or approve a budget, is provided with information solely at the CEO’s
20 discretion, and is uninformed about basic financials and material risks. . . .”); *supra*
21 Section II.C.3. Masimo stockholders should know the truth: Koffey manufactured
22 this lie to create the appearance of mismanagement and corporate governance issues
23 where none exist.

24 **(vii) The Politan Proxy Materials Fail to Disclose Why The Politan**
25 **Directors’ Refused To Sign The Form 10-K.** The Politan Proxy Materials fail to
26 disclose that the Politan Directors refused to sign Company’s 2023 Form 10-K even
27 though all of their concerns were addressed. *Supra* Section C.4. The reason was
28 simple: Koffey knew that if the entire Board did not sign the Form 10-K, it would

1 suggest to stockholders that something was amiss with the Company’s financials just
2 months before the stockholder vote at which control of the Company was at stake.
3 *See* Chapek Decl. ¶ 11.

4 **(viii) The Politan Proxy Materials Mischaracterize the Board’s Oversight**
5 **of a Potential Whole-Company Sale Process.** Politan’s Proxy Materials state that
6 the Board delegated “authority to [] Kiani” to “carry out a sale of the entire company
7 *without any obligation to provide process updates to the Board.*” Ex. 86, -6
8 (emphasis added). Politan further states that Brennan and Koffey did not “receive a
9 substantive update about the process until the first in-person Board meeting” in
10 October 2023, and that ultimately, Kiani told the Board that he was unable to find a
11 deal on “what he considered to be satisfactory terms.” *Id.* These statements are
12 demonstrably untrue.

13 *First*, the Board did not delegate to Kiani the authority to carry out a sale of
14 the entire Company, much less the authority to negotiate such a sale with no
15 oversight or input from the Board. Instead, as the June 24, 2023 Board meeting
16 minutes record, the Board made a *limited* delegation of authority to management to:
17 (1) “coordinate with Morgan Stanley on the process for exploring strategic
18 transaction options,” including soliciting “potential third party offers,” and (2)
19 “retain additional financial and other advisors to assist with exploring and pursuing
20 any such options.” Ex. 9. This was an entirely standard delegation to management
21 to undertake a process to explore strategic transactions and engage with potential
22 counterparties. *See City of Ft. Myers Gen. Emps.’ Pension Fund v. Haley*, 235 A.3d
23 702, 721 n.69 (Del. 2020) (“There is nothing inherently wrong with a Board
24 delegating” authority to “negotiat[e] a transaction.”). It was *not* an abdication of the
25 Board’s authority or ability to review—and ultimately approve—such a transaction,
26 as Politan’s disclosure states. And there are no facts to suggest otherwise.

27 *Second*, it is not true that the Politan Directors did not “receive a substantive
28 update” before October 31, 2023. Instead, Koffey and Brennan connected with the

1 Company's lead banker, John Collins, on July 13, 2023—less than three weeks after
2 they joined the Board. Exs. 15, 21. On August 1, 2023, Collins met with the Politan
3 Directors for an hour over Zoom to orient on the strategic alternative review process,
4 which included a potential sale of the whole Company, and answer any questions.
5 Ex. 23; Ex. 22; Collins Decl ¶ 2.

6 *Third*, Politan asserts that “Kiani told the full Board that he was unable to find
7 a deal *on what he considered to be satisfactory terms.*” Ex. 86, -6. That statement
8 is materially misleading, as it suggests that Kiani in fact received offers and
9 unilaterally evaluated whether they were “satisfactory.” But *no offers were*
10 *submitted*: as the February 13, 2024 minutes state, Kiani “informed the Board” that
11 “none of the strategic parties contacted by the Company or its financial advisors”
12 provided a bid. Ex. 41.

13 **2. The Politan Proxy Materials Caused Masimo's Injury And**
14 **Are An “Essential Link” To The Election Of The Politan**
15 **Slate**

16 Masimo satisfies the loss causation and transaction causation prongs of the
17 Section 14(a) violation test. As for loss causation, Masimo “was forced to expend
18 unnecessary Company resources in waging a proxy contest against” Politan, a proxy
19 contest which was illegitimate because of Politan's material misrepresentations and
20 omissions. *Enzo Biochem, Inc. v. Harbert Discovery Fund, LP*, 2021 WL 4443258,
21 at *9 (S.D.N.Y. Sept. 27, 2021) (finding loss causation plausibly pled where
22 company incurred significant expenses due to proxy contest necessitated by
23 misleading proxy materials). The Politan Proxy Materials are also an “essential
24 link” to achieving the election of a Politan slate, *see Va. Bankshares, Inc. v.*
25 *Sandberg*, 501 U.S. 1083, 1100 (1991), as they are necessary for Defendants to vote
26 stockholder proxies. Moreover, the false and misleading Politan Proxy Materials
27 convinced proxy advisory firms to endorse the Politan candidates, in reports that
28 parrot Defendants' lies as facts. *See* Ex. 111, 112; *see also Enzo Biochem, Inc. v.*

1 *Harbert Discovery Fund, LP*, 2021 WL 4443258, *10 (S.D.N.Y. Sept. 27, 2021)
2 (concluding plaintiff pled transaction causation where proxy solicitations persuaded
3 proxy advisory firm to endorse defendants' candidates, and solicitations misled
4 majority of stockholders into voting for defendants).

5 **3. Defendants Acted with at Least Negligence**

6 Defendants made the misstatements and omissions in the Politan Proxy
7 Materials with the requisite level of culpability, which for Section 14(a) and Rule
8 14a-9 is mere negligence. *See In re Maxim Integrated Prods., Inc., Deriv. Litig.*,
9 574 F. Supp. 2d 1046, 1066 (N.D. Cal. 2008). Under federal securities laws,
10 negligence is a failure to exercise "reasonable prudence." *SEC v. Dain Rauscher,*
11 *Inc.*, 254 F.3d 852, 856 (9th Cir. 2001). "Section 14(a) requires proof only that the
12 proxy solicitation was misleading, implying at worst negligence by the issuer. And
13 negligence is not a state of mind; it is a failure, whether conscious or even
14 unavoidable ..., to come up to the specified standard of care." *Beck v. Dobrowski,*
15 559 F.3d 680, 682 (7th Cir. 2009) (Posner, J.) (citation omitted). Not only was
16 Politan careless in manufacturing the lies outlined above, it *knew* that its attacks on
17 Masimo and Kiani were not true, and made them anyway. *See, e.g., Ex. 51.*

**B. Masimo And Its Stockholders Will Suffer Irreparable Harm
Absent A Preliminary Injunction**

Masimo is likely to suffer irreparable harm without a preliminary injunction, *Winter*, 555 U.S. at 20—because Masimo’s stockholders would be required to vote on directors in a contest for corporate control based on materially false and misleading proxy materials. Such an election, and any subsequent actions by the Board, cannot be easily unwound or redressed with money damages. Irreparable harm is harm “for which there is no adequate legal remedy, such as an award of damages.” *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014). This harm must be imminent, *see Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988), a requirement which is easily satisfied here given the upcoming stockholder meeting.

“[I]n corporate control contests the stage of preliminary injunctive relief, rather than post-contest lawsuits, is the time when relief can best be given.” *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 42 (1977) (quotation omitted) (citation omitted). “[P]reventing an uninformed shareholder vote through corrective disclosures once the inadequate disclosure is discovered is preferable to sorting out post-vote remedies for uninformed shareholders.” *Allergan*, 2014 WL 5604539, at *16. This principle is why courts have repeatedly found that the threat of an uninformed stockholder vote presents an irreparable harm when the vote involves “significant changes to [] corporate governance,” including major board elections. *Allergan*, 2014 WL 5604539, at *16; *see also Arcturus Therapeutics Ltd. v. Payne*, 2018 WL 2316790, *8 (S.D. Cal. May 22, 2018) (finding irreparable harm where “shareholders face a vote on a proxy contest without being informed of the truth behind their choices”); *Taseko Mines Ltd. v. Raging River Cap.*, 185 F. Supp. 3d 87, 93-94 (D.D.C. 2016) (finding irreparable harm where uninformed stockholder vote could “significantly affect who wins several director positions”); *St. Louis Police Ret. Sys. v. Severson*, 2012 WL 5270125, *6 (N.D. Cal. Oct. 23, 2012) (similar).

1 So too here. If Defendants are allowed to vote proxies they solicited in
2 violation of Section 14(a) and if other similarly uninformed stockholders vote for
3 the Politan slate, Politan will have gained majority control of the Board and Masimo
4 on false pretenses—all without providing Masimo stockholders with a control
5 premium. *See Bender v. Jordan*, 439 F. Supp. 2d 139, 176 (D.D.C. July 21, 2006)
6 (finding irreparable harm where there was a threat of an uninformed stockholder
7 vote and a substantial likelihood that allowing the election to go forward “would
8 helplessly complicate matters, perhaps making it impossible to unscramble the
9 eggs”) (quotations omitted).

10 Additionally, Koffey and Brennan are not working to achieve the most value-
11 maximizing deal for the sale of the Consumer Business. Not only have they urged
12 the Board to delay assessment on a Potential JV, which risks losing the highest
13 reasonable price, but Koffey has also said Masimo should give the Consumer
14 Business away for nothing. *See, e.g., Ex. 72; Muhsin Decl. ¶¶ 3-4; see also MONY*
15 *Grp., Inc. v. Highfields Cap. Mgmt., L.P.*, 368 F.3d 138, 148 (2d Cir. 2004) (finding
16 irreparable harm where uninformed proxy vote “could spell the loss of a business
17 opportunity that (by its nature) can only exist at one point in time and cannot be
18 recovered or repaired with money damages”); *True N. Commcn’s Inc. v. Publicis*
19 *S.A.*, 711 A.2d 34, 44-45 (Del. Ch. 1997) (describing the loss of a unique business
20 opportunity as “the essence of irreparable harm,” noting that “the loss of such
21 opportunity cannot be quantified”), *aff’d*, 705 A.2d 244 (Del. 1997). And Koffey’s
22 and Politan’s connections to the confidential witnesses in lawsuits that Masimo and
23 the Board are defending—including a witnesses who specifically told Politan that
24 channel stuffing had **not** occurred at Masimo—jeopardizes Masimo’s defense (and
25 potentially causes financial harm to the Company). *See Ex. 26 , -142; Ex. 29; Ex.*
26 *32; supra* Section II.C.1.

27 Politan’s lies are already working. Recent Glass Lewis and ISS reports
28 recommend Masimo stockholders vote their proxies in favor of the Politan slate,

1 citing Defendants' lies as the truth. *See* Exs. 111, 112. If the Politan slate is elected
2 without a fully informed vote, a Politan-run Board would make untold decisions that
3 cannot be unwound easily, if at all. Even if not viewed as a change-of-control
4 scenario (and it is), a newly constituted (but invalid) Board could take any number
5 of material, irreversible actions, including, for example, firing the Company's
6 founder and CEO or pursuing strategic transactions that could forever alter the
7 Company.⁹

8 Politan's own actions demonstrate this point: in a related action in the
9 Delaware Court of Chancery, Politan sought and obtained a status quo order
10 requiring five days' notice before Masimo could undertake certain strategic
11 transactions on the basis that such a transaction would result in irreparable harm
12 because it "could dramatically, and potentially irreversibly affect the Company
13 before the imminent Annual Meeting." Ex. 99, ¶ 18 (internal quotation marks
14 omitted). The parties are thus in agreement about what constitutes irreparable harm.

15 **C. The Balance Of Equities Favors Masimo**

16 The balancing of equities favors Masimo. *See Winter*, 555 U.S. at 24.
17 Masimo's potential harm is great, as without the limited injunction requested,
18 uninformed stockholders may vote to change control of the Board in Politan's favor.
19 *See, e.g., Lone Star Steakhouse & Saloon, Inc. v. Adams*, 148 F. Supp. 2d 1141, 1150
20 (D. Kan. 2001) (balance of hardship "clearly favors" plaintiff where plaintiff subject
21 to "irreparable injury to its reputation and shareholder trust," and "may be subject to
22 a major change" to its Board). In contrast, Defendants are not harmed by an
23 injunction that simply requires them to correct their own false and misleading
24 disclosures, which would involve little expense. *See id.*; *see also Allergan*, 2014
25 WL 5604539, at *16 (balance of equities for plaintiff where only cost to defendants
26

27 ⁹ Moreover, among others, more than 280 Masimo engineers recently threatened to
28 leave Masimo "if Joe Kiani is replaced by Quentin Koffey and Politan Capital."
Ex. 104.

1 was expense of making corrective disclosures). The requested relief would level the
2 playing field for Masimo and allow stockholders to cast an informed vote.

3 **D. A Preliminary Injunction Serves The Public Interest**

4 Masimo satisfies the last *Winter* factor: the requested injunctive relief serves
5 the public interest because it will lead to an informed stockholder vote. *See, e.g.,*
6 *Allergan*, 2014 WL 5604539, at *16 (“An injunction ordering corrective disclosures
7 is also in the public interest, as it prevents an uninformed shareholder vote.”).
8 Additionally, “effective enforcement of the federal securities laws promotes the
9 public interest.” *Taseko Mines Ltd.*, 185 F. Supp. 3d, at 94; *see also Lone Star*
10 *Steakhouse & Saloon*, 148 F. Supp. 2d at 1150 (holding a preliminary injunction
11 requiring a corrective disclosure served public interest because “the public interest
12 always lies with the truth”).

13 **E. No Security Should Be Required For The Preliminary Injunction**

14 Although Federal Rule of Civil Procedure 65(c) provides that a preliminary
15 injunction requires the movant give “security in an amount that the court considers
16 proper,” FRCP 65(c), the “district court retains discretion as to the amount of
17 security required, *if any.*” *Diaz v. Brewer*, 656 F.3d 1008, 1015 (9th Cir. 2011)
18 (quotation omitted). And it is Defendants’ burden to “present[] evidence that a bond
19 is needed.” *Conn. Gen. Life Ins. v. New Images of Beverly Hills*, 321 F.3d 878, 883
20 (9th Cir. 2003). The bond amount may be “zero” with no evidence of damage
21 suffered from the injunction. *Id.* at 882. There is no chance, much less likelihood,
22 of harm to Defendants here. No security should be required.

23 **IV. CONCLUSION**

24 Masimo respectfully requests that the Court issue an order preliminarily
25 enjoining Defendants from voting any proxies solicited by them in violation of
26 Section 14(a) or Rule 14a–9 until corrective disclosures are made.

27

28

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Masimo Corporation, certifies that this brief contains 9193 words, which complies with the word limit of set by court order dated August 23, 2024 (Dkt. 117).

Dated: August 23, 2024

/s/ Michele D. Johnson

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